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SENTENCE BY THE COURT

The COURT: Mr. Stanley, you are an experienced man in the field in which you have been convicted it would seem from your record. I don't know that anything that I can say to you would be any benefit to you or the public. You are mature, you know what you are doing when you do it. You are cognizant of course of the fact that you were violating the law because you had been caught for similar violations—that is as to the substantive offenses on a number of other occasions and sentenced by the Court. I am going to show you some leniency because of what has been said this morning in your behalf. It may be a forlorn hope but I do hope that when you finish with this that you have a disposition to do so and avail yourself of the opportunity of leading a law abiding, decent, respectable life. The sentence and judgment of the court is, on count one of the indictment, that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two and one-half years and that you pay a fine of five hundred dollars. On the remaining counts of the indictment, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years, and that you pay a fine of two hundred dollars; these sentences to run consecutively that is to say that the sentence on counts two, three, four, five, and nine shall start after the expiration of the sentence on count one. Provided further that the sentence imposed herein upon counts two, three, four, nine and ten shall be suspended and as to that part of the sentence you will be on probation for a period of five years.

As to the defendant Worrell, on the first count of indictment, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years and that you pay a fine of five hundred dollars. On the remaining counts of the indictment upon which you were convicted, that is counts two, three, and four, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period

of eighteen months and that you pay a fine of two hundred dollars, the last sentence to commence to run at the expiration of the first. Provided, that the last sentence, that is the sentence for eighteen months on counts two, three, and four, shall be suspended and you are placed on probation for a period of five years.

Jackson, I don't think that you were the instigator of this thing. I think you were just one of the tools that were used by higher-ups. But I am also convinced that you were a willing tool. And judging by the way you ran that automobile and used that smoke screen, you were a dangerous one. However, I am going to give you credit for the fact that I don't believe that you were the instigator or one of the prime factors in this case. The sentence and judgment of the court as to you on count one is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen months and that you pay a fine of one hundred dollars, under count one. As to the remaining counts upon which you were convicted, counts two, three, four, and nine, the sentence and judgment of the court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen months and that you pay a fine of one hundred dollars, this sentence to commence at the expiration of the sentence imposed on count one but provided that this sentence shall stand suspended and you will be placed on probation for a period of four years. That is the second sentence, not the first.

OPINION BELOW

BRYAN, District Judge:

Leroy Stanley, Charlie Watts Worrell, Jr., and Ben Jackson, Jr., appeal from their convictions of a conspiracy [1] to violate, and of immediate violations of, the Internal Revenue laws relating to distilled spirits.[2] Named with them as a conspirator, but not charged with the conspiracy, was one Milton Mack; he was, however, a de-

[1] 18 U. S. C. A. 371; 26 U. S. C. A. (1939 Internal Revenue Code) 2803, 2810, 2821, 2833, 2913, 3115, 3116, 3253, and 3321.

[2] 26 U. S. C. A. (1939 Internal Revenue Code) 2803, 2913, 3321.

fendant in several counts of the common indictment for the same or similar individual offenses as were charged to the appellants. In the joint trial he was convicted, too, but he has not appealed. Nor are we concerned with the disposition of the case in respect to the two remaining defendants in the indictment.

To the judgment of conspiracy all three appellants assign the same and single error: that the court allowed post-conspiracy, written statements of Milton Mack and Vernell Mack, his son, which incriminated the appellants as well as Milton Mack, to be used in the impeachment of the declarants in cross examination and subsequently admitted the statements in evidence, without timely or adequate caution to the jury that the statements could be considered only against the declarants, respectively, and not against the appellants. Each appellant asserts, in addition, other errors in his conviction of the substantive offenses.

The statements had been given, before trial, to an investigator for the Alcohol and Tobacco Tax Unit after the cessation of the alleged conspiracy; they consisted of a narrative by Milton Mack of the participation of himself and the appellants in the plot, and an account by Vernell Mack of this observation of these activities. After proof of its execution and voluntary character, Milton's statement was proffered in evidence, unrestrictedly, as part of the Government's case in chief. Upon objection the Government limited its proffer as evidence against Milton only. At this point the court excluded the paper.

The court was of the opinion that while, obviously, the statement was admissible against Milton, it was clearly not competent evidence against any of the other defendants. Further, the court felt that, practically, the statement could not be confined to Milton because in it Milton's activities were inextricably interwoven with those of his co-defendants and complotters. The trial judge concluded that the appellants could not be adequately protected from the statement if it were read to the jury, even though the court should concurrently give appropriate admonitions to the jury. However, the agent who took the statement was per-

mitted to testify as to what Milton had told him about Milton's complicity in the offenses, omitting mention of the other defendants.

Vernell's statement, although its voluntariness had been *prima facie* proved, was not presented as a part of the prosecution's opening case. He was called, by the attorney for Milton Mack, as the first defense witness. On the stand he denied any involvement of his father in the whiskey offenses. Upon cross examination he admitted his signature to the statement but repudiated its contents, contending that it had been obtained through coercion and that he had not made the declarations embraced in it. Over the objection of the appellants, the United States Attorney in interrogating Vernell read the statement to him in full, at the end of each line asking the witness if he had so stated. Receipt of the statement in evidence was postponed by the court until it could hear again the testimony of those who had taken it.

On the following day, Milton Mack testified in his own defense. He, too, denied his alleged part in the crimes described in the indictment. On cross examination he acknowledged his signature to his statement but, like Vernell, disavowed its substance. The District Attorney questioned Milton as he had Vernell, reading his statement to him and inquiring with each line whether he had so informed the agent.

After the defense had rested, the United States recalled the investigator and he again vouched the fairness of the circumstances under which the statements were obtained. Thereupon the court admitted in evidence the earlier rejected statement of Milton Mack as well as the statement of Vernell Mack theretofore deferred.

Undoubtedly, the jury was thus completely apprised of the comprehensive implication, by Milton and Vernell before trial, of the appellants in the crimes laid in the indictment. But we do not agree that this disclosure of the statements constituted reversible error. We find that the District Judge did warn the jury that the statements were not evidence against the appellants; and we think his admonitions were enough to avoid any prejudice to the appellants

which the statements otherwise might have imparted to the jury.

That these declarations were binding only upon their respective subscribers—that they were not evidence against the appellants—is necessarily a concessum in this case. That for their impeaching properties they could be used in cross examination of Milton and Vernell, as witnesses, cannot be denied; *Walker v. U. S.*, 1939, 104 F. (2d) 465, 470; *Wheeler v. U. S.*, 1953, D. C., cir. 211 F. (2d) 19, 26; and that Milton's statement was, in addition, competent proof to the truth of his alleged criminal conduct, likewise is plain, for he was a defendant as well as a witness and this was his confession. These purposes entitled the statements to admission in evidence, notwithstanding that the other defendants were detrimentally mentioned in the statements. *Stein v. New York*, 1953, 346 U. S. 156, 194; Opper v. U. S., 1954, 348 U. S. 84, 95; *Robinson v. U. S.*, 1954, D. C., cir. 210 F. (2d) 29, 32. The only question now is whether the court properly circumscribed the evidential force and reach of the statements. The law required the trial court to do so by prudently counseling the jury against the danger of injury to the other defendants. *Lutwak v. U. S.*, 1952, 344 U. S. 604, 618. Looking at the whole trial we think the jury was sufficiently advised by the judge, and were well aware, that each statement was evidence only in respect to the person who made it.

It is true that when the statements were bared to the jury the court did not, on either occasion, give immediate explanation to the jury of the limited effect they could give to the statement. Accompanying advice on the point by the court was certainly desirable; it would have been a salutary measure. As will be pointed out, however, we believe that the court's earlier observations to the parties in the presence of the jury, and its subsequent explicit directions to the jury, remedied its failure to give concomitant instructions as reference was made to the statements.

Milton Mack's statement was initially mentioned in the case when its execution was proved through the investigator adduced by the Government in its opening. At that time the court made it quite clear to everyone that the statement was

not employable against any of the defendants save Milton. In other connections throughout the trial, the court called the attention of the jury to the rule, and necessity, of not considering statements against anyone save the author, except in prescribed circumstances. When Milton's statement was tendered in evidence, in the afternoon following the morning of its use in his cross examination, the same point was made by defense counsel and concurred in by the United States Attorney before the jury, and then twice explained to the jury by the court, in these words: "It is only evidence, gentlemen of the jury, against the party who made that statement, which is Milton Mack", and "It is evidence against him but not against any of the others." During the course of the charge the following request was made and granted:

> Counsel: "Your Honor, if the Court pleases, I request that you charge the jury that the statement put in evidence which was given by Milton Mack cannot be used as against the defendants Stanley, Jackson, and Worrell.
>
> "The Court: Any statement, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, can not be considered against any other defendant. It can be considered only against him. * * *"

True, these express warnings of the court did not specifically include Vernell's statement; but there was never any objection by anyone, on the ground of its incrimination of others, to the admission of Vernell's statement in evidence. Moreover, Vernell's statement did not mention the appellants Worrell and Jackson and, therefore, only appellant Stanley can rely upon any error in its use. We think the jury was kept constantly mindful, through the reiteration of the principle by the court on Milton's statement and in other instances, that Vernell's extrajudicial utterances could be related to no one but Vernell.

Furthermore, the only request for a limiting caution in regard to Vernell's statement was offered just before its use on cross examination, when Stanley's attorney said, "Your honor, we would like to take the same position that

[another defense attorney] took this morning as to the other statement to [of] Milton Mack, that this be confined to the same, strictly to Vernell Mack." Though not acted upon, the request was never repeated, either during the examination or in a prayer to charge. If Stanley felt Vernell's statement had not been effectively immured, indisputably he had the right and duty, as well as the opportunity, to seek greater protection from the court, for the court had never evinced an unwillingness to afford such protection. Nor did the defense ever ask the court to tell the jury that Vernell's statement, even as to Vernell, was in no sense evidence of the truth of its contents, but only evidence of the factum of a prior inconsistent declaration. *Southern Ry. v. Gray,* 1916, 241 U. S. 333,337; *Barrett v. Virginia Ry. Co.,* 1917, 4 cir. 244 Fed. 397,400, rev. on other grounds 250 U. S. 473. Remiss in his duty, he cannot successfully impute error to the court for the omission of these warnings. *Troutman v. U. S.,* 1938, 10 cir. 100 F. (2d) 628, 634; *Wheeler v. U. S.,* 1954, D. C. cir. 211 F. (2d) 19, 26, note 17; *Cwach v. U. S.,* 1954, 8 cir. 212 F. (2d) 520, 526; *Davis v. U. S.,* 1956, 229 F. (2d) 181, 186. We hold appellant Stanley's failure to pursue his request in the trial court precludes his insistence upon it here.

Against their convictions on the substantive offenses the appellants urge the error we have just considered in regard to their conspiracy conviction. Again we find no merit in it. Additionally, the appellants assign other errors peculiar to their respective individual cases; upon examination of them we are satisfied they are insubstantial.

Affirmed.

OBJECTIONS BY COUNSEL FOR PETITIONERS TO READING OF STATEMENT OF VERNEL MACK

Mr. REAGAN: Your Honor, we would like to take the same position that Mr. Edens took this morning as to the other statement to Milton Mack, that this be confined to the same, strictly to Vernell Mack.

The COURT: This man is on the witness stand now testifying first handed.

Mr. BELSER: That is right.

The COURT: It is offered in behalf of the defendant. He is subject to cross examination if he has made prior statements that are contradictory of what he has now testified that may now be introduced.

OBJECTIONS BY COUNSEL FOR PETITIONERS TO READING OF STATEMENT OF MILTON MACK

Mr. BERRY: Your Honor, we object to the District Attorney proceeding to read this statement, because Your Honor has previously ruled that the statement was not admissible as evidence. He is simply trying to do one way something the Court has directed * * *

The COURT: You seem to be a little bit confused about the rules of evidence.

Mr. BERRY: Your Honor, this is a statement * * *

The COURT: Well now, are you going to let me talk or not?

Mr. BERRY: Yes, sir.

The COURT: It is one thing to offer a statement of a person who is not on the witness stand. It is another thing to examine that person when he is on the witness stand about a statement he has made previously—an entirely different situation. It no longer becomes hearsay when he is there on the stand himself and he is asked about some statement he made, of course. That is elementary. Go ahead.

REQUEST FOR CHARGE BY MR. BERRY

Mr. BERRY: Your Honor, if the Court pleases, I request that you charge the jury that the statement put in evidence which was given by Milton Mack cannot be used as against the defendants Stanley, Jackson and Worrell.

The COURT: Any statement, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, can not be considered against any other defendant. It can be considered only against him. But any statement that he may have made during the course of the conspiracy and in furtherance of it can be used, if any such exists. I don't recall whether there is any such as that or not. But, any way, no statement that he made after, after September, 1953 could be used against anybody except himself.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLIE WATTS WORRELL, JR., AND BEN JACKSON, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 14-19; R. 213-220) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1956 (R. 221). The petition for a writ of certiorari was filed on December 7, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether post-conspiracy written statements of a co-defendant and his son, which were used in impeachment

of the declarants when they testified as defense witnesses, were properly limited by the court's instructions as evidence only against the declarants and not against petitioners who were implicated by the statements.

STATEMENT

Petitioners Stanley, Worrell, and Jackson were found guilty in a jury trial in the United States District Court for the Eastern District of South Carolina of a conspiracy to violate, and substantive violations of, the Internal Revenue laws relating to distilled spirits (R. 209). Stanley was sentenced to imprisonment for 2½ years and a $500.00 fine on count 1 for conspiracy, and to two years' imprisonment and a fine of $200.00 on counts 2, 3, 4, 9, and 10, to run consecutively, with the sentences on these counts suspended and Stanley placed on probation for five years (R. 209). Worrell was sentenced to imprisonment for two years and a $500.00 fine on count 1, and to 18 months' imprisonment and a $200.00 fine on counts 2, 3, and 4, to commence at expiration of the sentence on count 1, with the sentences on these counts suspended and Worrell placed on probation for five years (R. 210). Jackson was sentenced to imprisonment for 15 months and a $100.00 fine on count 1, and to 15 months' imprisonment and a $100.00 fine on counts 2, 3, 4, and 9, to commence at the expiration of the sentence on count 1, with the sentences on these counts suspended and Jackson placed on probation for four years (R. 210). The three petitioners appealed (R. 205-208), and their convictions were unanimously affirmed (R. 221).

Pertinent evidence adduced at the trial may be summarized as follows:

On December 21, 1953, after the termination of the alleged conspiracy in January 1953, Milton Mack, who was named in the indictment in several substantive offenses with petitioners as a conspirator (although not charged with the conspiracy), executed a signed sworn statement (Gov. Ex. 3) before two government investigators (R. 184-187). This statement implicated petitioners Stanley and Worrell with storing bootleg whiskey at Mack's farmhouse, and petitioner Jackson with unloading such whiskey there (R. 184-187).

Vernell Mack, Milton's son, executed a signed sworn statement dated February 10, 1954 [1] (Gov. Ex. 2), before two government investigators. The substance of this statement was that Vernell had observed his father and petitioner Stanley on various occasions using the farmhouse as a place to store bootleg whiskey (R. 181-184).

There was evidence to the effect that, prior to the trial, Stanley and Worrell induced the Macks to repudiate their signed sworn statements (R. 199, 202). As a result of such repudiation, neither of the Macks testified for the government.

In the prosecution's case in chief, after proof of the voluntary execution of Milton Mack's statement, the government offered it in evidence (R. 4). Counsel for Worrell objected to showing the statement to the jury on the ground that references in it to any defendants other

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[1] This statement is also dated January 11, 1954 (R. 184), as the time of the oath. Probably this should read February 11, 1954, but the discrepancy in dates is of no importance so far as the case is concerned.

than Mack would be inadmissible since the statement was taken after termination of the conspiracy. The court excluded the statement from evidence, but permitted its use, without mention of petitioners' names, to refresh the government agent's memory as to what defendant Mack had told him about his personal part in the case (R. 6-7).

On cross-examination of Vernell Mack as a defense witness, the government offered his statement (Gov. Ex. 2) in evidence (R. 59-60). The following occurred (R. 60, 187):

> Mr. Reagan [Stanley's counsel]: Your Honor, we would like to take the same position that Mr. Edens [Worrell's counsel] took this morning as to the other statement to [of] Milton Mack, that this be confined to the same, strictly to Vernell Mack.
>
> * * * * *
>
> The Court: It is offered in behalf of the defendant. He is subject to cross-examination if he has made prior statements that are contradictory of what he has now testified that may now be introduced.

Vernell was then asked in a series of questions whether he had given the information in his statement. He admitted his signature but repudiated the statement (R. 60-65). Upon objection of counsel for Milton Mack, the court postponed receipt in evidence of Vernell's statement until it could hear testimony of those who had taken it (R. 65-66).

The following day, Milton Mack testified as a defense witness on his own behalf (R. 7). On cross-examina-

tion, he admitted that he had signed his statement (Gov. Ex. 3), but said he had been afraid and had done so at the inducement of government officials in order to keep out of jail (R. 31-32). When government counsel started to read from Milton's statement in cross-examination, counsel for Jackson objected (R. 34, 190-191):

> Mr. Berry: Your Honor, we object to the District Attorney proceeding to read this statement, because Your Honor has previously ruled that the statement was not admissible as evidence. He is simply trying to do one way something that the Court has directed * * *.
>
> The Court: You seem to be a little bit confused about the rules of evidence. * * * It is one thing to offer a statement of a person who is not on the witness stand. It is another thing to examine that person when he is on the witness stand about a statement he has made previously—an entirely different situation. It no longer becomes hearsay when he is there on the stand himself and he is asked about some statement he made, of course. That is elementary. Go ahead.

The government attorney then read the statement, inquiring after each line whether Milton Mack had so informed the agent. In repudiating the statement, Milton denied his alleged part in the crimes (R. 35, 39-43).

After the defense had rested, the government recalled its investigator who again testified as to the fairness of the circumstances under which the statements were taken (Pet. App. 16). Thereafter, Vernell's statement was introduced in evidence "for what it is worth," over objection by counsel for Milton Mack that because

of Vernell's illiteracy he could not tell whether the statement introduced was his (R. 191-192). Milton's statement was admitted into evidence under the following circumstances (R. 192-193):

> Mr. Belser [government attorney]: Your Honor, I offer in evidence this paper (statement of Wilton [sic] Mack) which was previously marked for identification G-3.
>
> Mr. Berry [Jackson's counsel]: Your Honor, if the Court pleases, we object to that being admitted against the other defendants. That statement was made after the alleged conspiracy had ended. We, therefore, contend that it is not admissable [sic] as against the other defendants.
>
> The Court: It is not evidence against the other defendants.
>
> Mr. Belser: I am perfectly willing to have Your Honor instruct the jury to that effect.
>
> The Court: It is only evidence, gentlemen of the jury, against the party who made that statement, which is Milton Mack. * * * It is evidence against him but not against any of the others.

During the course of the court's charge, petitioner Stanley admitted guilt on counts 9 and 10 and petitioner Jackson admitted guilt on count 10 (R. 193-194).[2] Counsel for Jackson requested the court to charge that Milton Mack's statement could not be used against pe-

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[2] In asking that he be put on probation after conviction, petitioner Worrell stated, "I don't say, Your Honor, that the jury didn't find a just verdict as far as I am concerned. * * *" (R. 203).

titioners Stanley, Jackson, and Worrell, and the court complied, using this language (R. 194):

> Any statements, gentlemen of the jury, made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, cannot be considered against any other defendant. It can be considered only against him. * * *

ARGUMENT

Contrary to petitioner's contention, the post-conspiracy written statements of defendant Milton Mack and of his son, Vernell, were properly limited by the court's instructions throughout the entire trial. In the total setting of the case the jury must have understood that these statements could be considered only as against the declarants and not against the petitioners.

1. *Milton Mack's statement*—Tantamount to a confession, this statement principally incriminated petitioners Stanley and Worrell, and also mentioned petitioner Jackson (R. 184-187). When it was first referred to in the government's case in chief, the court excluded it from evidence on the ground that even a limiting instruction would not have protected petitioners since Mack's activities were so closely interwoven with theirs. Even at this early stage of the trial, the court made clear to the jury that Mack's statement could be considered as evidence against him alone (R. 5-7).

After Mack affirmatively took the stand for the defense, however, the statement could properly be utilized for impeachment purposes. *Cf. C., M. and St. P. Railway* v. *Artery*, 137 U.S. 507, 519-520; *Wheeler* v. *United States*, 211 F. 2d 19, 25-26 (C.A. D.C.), certiorari denied, 347 U.S. 1019; *Weiss* v. *United States*, 122 F. 2d

675, 688 (C.A. 5), certiorari denied, 314 U.S. 687; *Walker* v. *United States*, 104 F. 2d 465, 470 (C.A. 4). When the statement was finally admitted in evidence over defense objection, the court unequivocably instructed that "It is not evidence against the other defendants," and "It is only evidence * * * against the party who made that statement, which is Milton Mack" (R. 192, 193). And in its final charge, in response to a request for a similar instruction, the court said, "Any statement * * * made by any one of the defendants after the end of the conspiracy, if it was after the date of the alleged conspiracy, cannot be considered against any other defendant. It can be considered only against him" (R. 194).

Just as a court's final charge to the jury must be read in its entirety (*Boyd* v. *United States*, 271 U.S. 104, 107), so, in answering the question whether the jury was adequately apprised of the precept that Mack's statement could be used only against him, the entire record, including all of the court's instructions and remarks, must be scrutinized. When this is done, it is clear that the jury must have understood the legal principle involved. See *Opper* v. *United States*, 348 U.S. 84, 94-95; *United States* v. *Delli Paoli*, 229 F. 2d 319, 322 (C.A. 2), pending on writ of certiorari, No. 33, this term.

The decision below is not at variance with *Lutwak* v. *United States*, 344 U.S. 604 (see Pet. 5-7). Both rulings recognize the principle that post-conspiracy declarations made in the absence of a co-conspirator are inadmissible unless the court, by its instructions, makes it clear that the evidence is to be limited against the declarant only. The passages quoted by the petitioner from *Lut-*

wak (Pet. 6, 7) do not hold that the court must in every case, regardless of the circumstances, give an explicit limiting instruction immediately upon mention of the declarant's statement, even prior to its admission in evidence. The proper criterion established by that case is simply that the caution must be adequate in the circumstances. That standard was met in the instant case, as we have pointed out.

Nor do we believe that the disposition of this case need await the outcome of the pending *Delli Paoli* case, No. 33, this Term. The particular circumstances of the two cases are significantly different, and unless the Court were to hold in No. 33 that a statement by a co-conspirator implicating other defendants is never admissible—no matter how full the limiting instructions—the result in No. 33 would not be directly pertinent here. And petitioners, unlike *Delli Paoli*, do not make that broad claim, but urge only that the particular admonitions given in their case were not in fact adequate.

2. *Vernell Mack's statement*—This was less important than Milton Mack's statement since Vernell was not a defendant and his statement incriminated only Stanley of the three petitioners. When Vernell's statement was first mentioned on his cross-examination, Stanley's counsel requested that it be confined strictly to Vernell, in line with the same objection that Worrell's counsel had made to Milton Mack's statement. This request was not acted upon at that time, but the court did properly rule that, for impeachment purposes, if Vernell "has made prior statements that are contradictory of what he has now testified that may now be introduced" (R. 60, 187). When Vernell's statement was finally admitted

in evidence, the objection urged was his illiteracy, and the objection that the statement could be related to no one but him was not repeated (R. 191-192). Neither was a request for such an instruction made at the time of the court's final charge (R. 194).

In these circumstances, it is submitted that the court below was correct in ruling that "[I]f Stanley felt Vernell's statement had not been effectively immured, indisputably he had the right and duty as well as the opportunity, to seek greater protection from the court, for the court had never evinced an unwillingness to afford such protection" (Pet. App. 19). When a party might have had all that he was entitled to in the way of instructions from the trial court, he is in no position to complain of the court's instructions to which no exception was taken. *Cf. Pennsylvania Railroad Co.* v. *Minds,* 250 U.S. 368, 375; *Troutman* v. *United States,* 100 F. 2d 628, 634 (C.A. 10); *Cwach* v. *United States,* 212 F. 2d 520, 526 (C.A. 8). Moreover, because of the court's numerous admonitions that Milton Mack's statement as a conspirator could be used only against him alone and not against petitioners, it is highly unlikely that the jury adopted a contrary rule regarding Vernell's implication of petitioner Stanley.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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JANUARY 1957.

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